No. 85-806

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RICKY G. ELLIOTT,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Court of Appeals
for the First Appellate District of Ohio
Hamilton County

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A PREVIOUS APPLICATION TO AN INVALID SEARCH WARRANT OF AN INTERPRETATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY A UNITED STATES DISTRICT COURT IS BINDING UPON STATE COURTS CONSIDERING PRECISELY THE SAME FEDERAL CONSTITUTIONAL QUESTION ON PRECISELY THE SAME WARRANT AND FACTS UNDERLYING THE DISTRICT COURT'S DECISION.

II.

WHETHER AN AFFIDAVIT FOR A SEARCH WARRANT OF A DWELLING HOUSE WHICH ALLEGES ONLY THAT AT SOME UNSPECIFIED TIME AND DATE ANONYMOUS CALLS WERE MADE TO POLICE ALLEGING "DRUG ACTIVITY AT THAT HOUSE;" THAT AT SOME UNSPECIFIED TIME AND DATE THE AFFIANT-OFFICER WITNESSED SEVERAL VEHICLES VISITING SUCH HOUSE FOR SHORT PERIODS OF TIME; AND THAT ON THE DAY BEFORE THE AFFIDAVIT THE AFFIANT-OFFICER EXAMINED GARBAGE FROM SUCH RESIDENCE AND DISCOVERED AN UNSPECIFIED AMOUNT OF PARTIALLY-SMOKED MARIJUANA CIGARETTES, AND AN UNSPECIFIED AMOUNT OF MARIJUANA STALKS, FURNISHES, WITHOUT MORE, SUFFICIENT FACTS TO SUPPORT A FINDING OF PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT FOR SUCH PREMISES.

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WHETHER AN OFFICER MAY CONSTITUTIONALLY RELY IN GOOD FAITH UPON A SEARCH WARRANT ISSUED UPON AN AFFIDAVIT DEVOID OF FACTS UPON WHICH PROBABLE CAUSE COULD OBJECTIVELY BE INFERRED SO AS TO PERMIT THE ADMISSION OF EVIDENCE SEIZED FROM A PRIVATE DWELLING HOUSE PURSUANT TO SUCH WARRANT.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

PETITION

Ricky G. Elliott, Petitioner herein, respectfully prays that a writ of certiorari issue to review his conviction of trafficking in drugs, which was affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio.

OPINIONS BELOW

Petitioner's conviction was affirmed on December 26, 1984, by the Court of Appeals for the First Appellate District, Hamilton County, Ohio. A copy of that decision, which is unreported, is appended hereto as Appendix A. The Supreme Court of Ohio declined to review the case on September 11, 1985. A copy of that decision is appended hereto as Appendix B.

This appeal is from a conviction resulting from a prosecution in state court. There was a federal prosecution initiated as well, which was terminated by the government after the United States District Court for the Southern District of Ohio granted Petitioner's motion to suppress evidence in the federal case. The opinion of the District Court, Judge S. Arthur Spiegel, granting Petitioner's motion is appended hereto as Appendix C, and Judge Spiegel's decision denying the government's application for reconsideration in Appendix D. Judge Spiegel's opinion is reported at 576 F. Supp. 1581, *sub. nom. United States* v. *Elliott*.

JURISDICTION

The decision of the Supreme Court of Ohio denying review was entered September 11, 1985. This Petition is timely filed, and jurisdiction is founded upon 28 U.S.C. 1257(3), Petitioner having asserted below and in this Court deprivation of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE VI, UNITED STATES CONSTITUTION:

Article VI of the United States Constitution, provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FOURTH AMENDMENT, UNITED STATES CONSTITUTION:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 12, 1983, at 8:30 A.M., one of the judges of the Hamilton County Municipal Court in Cincinnati, Ohio, issued a search warrant upon the affidavit of one Patrick Dilbert, an agent of the Regional Enforcement Narcotics Unit (RENU), authorizing the search of the home of Petitioner, Ricky G. Elliott, at 1102 Madeline Circle, Springfield Township, Hamilton County, Ohio.

The factual portion of the affidavit in support of the warrant reads in its entirety as follows:

> Due to anonymous citizens complaints concerning drug activity, on the afternoon of August 11, 1983 at approximately 2:00 pm affiant picked up two sealed garbage bags which were abandoned at the curb side located in front of 1102 Madeline Circle, the residence of Rick Elliott. Affiant thoroughly searched both sealed bags and found a quantity of partially smoked marijuana cigarettes and several stems from marijuana stalks, portions of which were field tested by affiant and found to test positive for marijuana. Also found were personal papers indicating the garbage was the discarded propety (*sic*) of Rick Elliott, 1102 Madeline Circle. Affiant having been a police officer for over 4½ years and a narcotics investigator for over 1½ years has had numerous contacts with marijuana and is familiar with its appearance and the normal packaging and pattern for its distribution. Affiant has observed several vehicles which have visited the described premises and stayed for only a short period of time which is, to affiant, the normal pattern for drug related activity.

The search warrant was executed the same day,

August 12, 1983, and police recovered marijuana seeds, marijuana, pipes, scales, rolling papers, and a .22 calibre pistol equipped with a silencer.

Petitioner was arrested and was charged in the United States District Court for the Southern District of Ohio, Western Division, with federal firearms violations under 26 U.S.C. 5861 (d) and (i) and 5871. The indictment was returned and filed November 17, 1983.

Petitioner successfully challenged the search and seizure on Fourth Amendment grounds, and Judge Spiegel granted his motion to suppress the gun from evidence on January 13, 1984, and denied the government's motion for reconsideration on February 29, 1984. The basis for Judge Spiegel's decision was that the affidavit upon which the warrant was based "provides no substantial basis for an inference of [the existence of] probable cause." (App. 9a). On March 7, 1984, the government dismissed the indictment against Petitioner, indicating in the order for dismissal that it had decided not to appeal Judge Spiegel's decision and no longer had sufficient evidence on which to proceed.

But Petitioner had also been indicted on state charges, by the Grand Jury of Hamilton County, Ohio. On October 6, 1983, Petitioner was indicted for trafficking in drugs. As he had in federal court, Petitioner filed a motion to suppress evidence, alleging violations of his rights under the Fourth and Fourteenth Amendments. At the hearing and argument on that motion on February 9, 1984, Petitioner cited Judge Spiegel's opinion and decision to the state trial judge, to no avail. After his motion to suppress evidence in the state court was denied, Petitioner entered a plea of no contest (thus preserving pursuant to Ohio law his right to appeal the denial of the motion to suppress), was found guilty of one charge and

was sentenced to 18 months' incarceration and a $2,000.00 fine, with 90 days of the sentence to be actually behind bars, and the balance on probation. He was, and is yet, free on an appeal bond.

The Court of Appeals for the First Appellate District rejected Petitioner's appeal and totally ignored Judge Spiegel's decision and opinion, though Petitioner had relied heavily thereon in the appeal. The appellate court found that probable cause existed, and affirmed Petitioner's conviction on December 26, 1984. The Ohio Supreme Court refused to hear the case on September 11, 1985, and this Petition ensued.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NOT YET SPOKEN ON THE IMPORTANT ISSUE OF WHETHER STATE COURTS ARE BOUND BY DECISIONS OF FEDERAL COURTS INFERIOR TO THE SUPREME COURT OF THE UNITED STATES ON FEDERAL CONSTITUTIONAL QUESTIONS. GIVEN THE DRAMATIC INCREASE IN APPELLATE CASES IN BOTH THE STATE AND FEDERAL JUDICIAL SYSTEMS IT IS IMPERATIVE THAT THE SUPREMACY OF THE INTERPRETATIONS OF FEDERAL CONSTITUTIONAL PROVISIONS BY FEDERAL COURTS OVER SUCH INTERPRETATIONS BY STATE COURTS BE FIRMLY AND UNEQUIVOCALLY ESTABLISHED IN OUR NATIONAL JURISPRUDENCE.

THE ISSUE

WHETHER A PREVIOUS APPLICATION TO AN INVALID SEARCH WARRANT OF AN INTERPRETATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY A UNITED STATES DISTRICT COURT IS BINDING UPON STATE COURTS CONSIDERING PRECISELY THE SAME FEDERAL CONSTITUTIONAL QUESTION ON PRECISELY THE SAME WARRANT AND FACTS UNDERLYING THE DISTRICT COURT'S DECISION.

The factual fundament of this claim is that the Ohio courts totally ignored and disregarded the opinion of the United States District Court for the Southern District of Ohio which held that the very warrant which yielded the contraband forming the basis of Petitioner's state criminal charge was unconstitutionally obtained in violation of the Fourth Amendment, which consequently required the suppression from evidence of that contraband.

The Supremacy Clause of the Constitution of the United States provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, U.S. Const.

The Fourth Amendment is, of course, a part of the

Constitution, as is the Fourteenth Amendment, through the due process clause of which the states are bound to recognize and enforce the Fourth Amendment proscription against unreasonable searches and seizure and the requirement that warrants be issued only upon probable cause, *Wolf* v. *Colorado*, 338 U.S. 25 (1948); *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

"[A] state search warrant being challenged in a federal court must be judged by federal constitutional standards," *Elkins* v. *United States*, 364 U.S. 206 (1960). But the Fourth Amendment means the same whether it is being interpreted by state or federal courts. In this case, the same search warrant and the same federal constitutional issue was interpreted differently by the state courts and by the United States District Court.

The precise question before the Court, therefore, is whether the state courts are free to ignore the ruling of a federal District court, based upon federal constitutional standards, that the same search warrant which led to seizure of evidence used in prosecuting the same defendant in both jurisdictions was unconstitutionally obtained, and that the evidence seized pursuant thereto must be suppressed.

The Ohio Supreme Court has recognized that the decisions of this court on federal constitutional questions are absolutely binding upon all state courts, *State* v. *Fletcher*, 26 Ohio St.2d 221, 271 NE2d 567 (1971), and that Court has also recognized that where federal statutes are involved the "substantive law as laid down by the federal courts and particularly the Supreme Court of the United States is controlling," *Harris* v. *Penna. R. Co.*, 168 Ohio St. 582, 156 NE2d 822, at 825 (1959). There have been only occasional cases wherein the obligation of state courts to follow constitutional in-

terpretations of federal courts inferior to this Court has been set forth. See, e.g., *United States, ex. rel. Malone* v. *Greer*, 581 F. Supp. 1251 (N.D. Ill. 1984), in which that District Court ruled that "The Illinois courts are equally bound, under the Supremacy Clause, to apply the standards articulated in *Scott* and *Welsh**, [two decisions of an intermediate federal appellate court] when reviewing decisions of the Illinois Prisoner Review Board." *Id.* at 1255.

But the Ohio courts are not as willing to follow decisions of federal District or appellate interpretations of the federal constitution in criminal cases. In the case at bar, Judge Spiegel's opinion and decision were totally ignored by the Court of Appeals and by the Ohio Supreme Court. There is not even a hint in the opinion of the Court of Appeals of the fact that Petitioner was ever prosecuted in federal court for possession of contraband secured through the same unconstitutional warrant as the contraband involved in the case the court was even then deciding.

In the past, however, the court below has expressed its attitude toward federal constitutional interpretations of federal courts inferior to this Court. In *State* v. *Glover*, an unreported case also involving interpretation of the Fourth Amendment, the Court below rejected a decision of the United States Court of Appeals for the Sixth Circuit thusly:

> We would first make the observation that, although we hold the Sixth Circuit Court of Appeals of the Federal Court system in high regard and we find their decisions to be most persuasive, we are

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* *United States ex. rel. Scott* v. *Illinois Parole & Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982) and *Welsh* v. *Mizell*, 668 F.2d 328 (7th Cir. 1982).

not bound to follow the holdings that they articulate. See 20 Am. Jur.2d Sec. 225 *Courts* p. 556 (1965).

State v. *Glover* (1st Dist. Unrep. 9-27-78), No. C 77772.

Here, Petitioner and the District Court did not even receive the benefit of the damnation with faint praise of the federal courts received by Glover.

This Court has already held that federal decisions, where *not* based on constitutional principle, may be disregarded by state courts so long as the state procedure is consistent with due process of law, *Fletcher* v. *Weir*, 455 U.S. 603 (1982). Of course, the disregard of the district Court opinion here by the Ohio courts constitutes a violation of due process, as the due process clause of the Fourteenth Amendment is the fundamental basis for the application of the Fourth Amendment to the states. But apparently the Ohio courts are unconvinced by clear statements as set forth in *Fletcher*.

We note that the problem is particularly pressing in cases such as this where the constitutional violation is a Fourth Amendment violation. In *Stone* v. *Powell*, 428 U.S. 465 (1976), the Court for all practical purposes foreclosed to Petitioner the remedy of federal habeas corpus. Were that remedy available, Petitioner would not be petitioning this Court; he would have already filed his petition for habeas corpus in the District Court, (perhaps even having the case assigned to Judge Spiegel), and would have obtained the relief from that Court in the state prosecution that he had obtained in the federal: suppression of the tainted evidence and eventual dismissal of his charges.

This Court is urged to accept review and to hold that,

at least as to interpretations of the Fourth Amendment in criminal cases, that "State courts are required to follow the substantive federal law when addressing federal issues;" *Hess* v. *Great Atlantic & Pacific Tea Co. Inc.*, 520 F. Supp. 373 (N.D. Ill. 1981), and that the substantive federal law expounded by federal District Courts and by federal intermediate appellate courts must be followed by state courts as required by the Supremacy Clause.

II.

THIS CASE PRESENTS THE OPPORTUNITY TO FLESH OUT THE DECISION OF THIS COURT IN UNITED STATES V. LEON, AND TO ADOPT AS CONSTITUTIONAL LAW THE DICTUM IN THAT CASE THAT AN AFFIDAVIT FOR A SEARCH WARRANT WHICH IS DEVOID OF FACTS WHICH CAN SUPPORT AN INFERENCE OF PROBABLE CAUSE MAY NOT LAWFULLY SERVE AS A FUNDAMENT OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE PERMITTING THE SEARCH FOR AND THE SEIZURE OF EVIDENCE BASED UPON THE ISSUANCE OF SUCH WARRANT.

THE ISSUES:

A.

WHETHER AN AFFIDAVIT FOR A SEARCH WARRANT OF A DWELLING HOUSE WHICH ALLEGES ONLY THAT AT SOME UNSPECIFIED TIME AND DATE ANONYMOUS CALLS

WERE MADE TO POLICE ALLEGING "DRUG ACTIVITY AT THAT HOUSE;" THAT AT SOME UNSPECIFIED TIME AND DATE THE AFFIANT-OFFICER WITNESSED SEVERAL VEHICLES VISITING SUCH HOUSE FOR SHORT PERIODS OF TIME; AND THAT ON THE DAY BEFORE THE AFFIDAVIT THE AFFIANT-OFFICER EXAMINED GARBAGE FROM SUCH RESIDENCE AND DISCOVERED AN UNSPECIFIED AMOUNT OF PARTIALLY-SMOKED MARIJUANA CIGARETTES, AND AN UNSPECIFIED AMOUNT OF MARIJUANA STALKS, FURNISHES, WITHOUT MORE, SUFFICIENT FACTS TO SUPPORT A FINDING OF PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT FOR SUCH PREMISES.

B.

WHETHER AN OFFICER MAY CONSTITUTIONALLY RELY IN GOOD FAITH UPON A SEARCH WARRANT ISSUED UPON AN AFFIDAVIT DEVOID OF FACTS UPON WHICH PROBABLE CAUSE COULD OBJECTIVELY BE INFERRED SO AS TO PERMIT THE ADMISSION OF EVIDENCE SEIZED FROM A PRIVATE DWELLING HOUSE PURSUANT TO SUCH WARRANT.

Simply put, the gist of the argument to follow is that, since the most important component of any application for a search warrant is time — that there is probable cause to believe that the evidence sought is *at the time of the application* present upon the premises sought to be searched — then an affidavit upon which a search war-

rant is sought to be issued is fatally defective where there are insufficient facts alleged therein upon which it can be inferred that the evidence is then and there present upon such premises. This being the case, it follows that a warrant issued upon such an application/affidavit is defective; it also follows that the affiant of such an affidavit is charged with objectively being aware of the temporal deficiencies of such an affidavit and the warrant issued thereon, and he cannot rely thereupon with objective good faith.

The facts set forth in the affidavit which the state successfully contended below supported an inference of probable cause are three: (1) the anonymous tip; (2) the result of the search of the abandoned garbage bag found in front of Petitioner's dwelling house; and (3) the observation by the affiant-officer of "several vehicles which have visited the described premises and stayed only a short period of time." Only the search of the garbage bag is identified as to the date and time of its occurrence. The affidavit did not state when the anonymous tips were received; the affidavit did not state when the affiant observed the several vehicles which stayed only a short period of time. The garbage bag was searched the day before the affidavit was signed and the warrant issued and executed.

None of these facts as stated in the affidavit can, considered either individually or collectively, supply facts to an impartial magistrate sufficient to constitute probable cause, *Illinois* v. *Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983).

The Court below readily conceded that "the anonymous complaint would, standing alone, have been inadequate to sustain a finding of probable cause." (Op. 4a). But the Court below did not even consider the tem-

poral deficiencies of the affidavit in reaching this conclusion.

The District Court, however, found that since there was no allegation in the affidavit as to when those tips were received, they could not possibly even contribute to a finding of probable cause. The case was similar to that in *Rosencrantz* v. *United States*, 356 F.2d 310 (1st Cir. 1966), where the affidavit in support of the search warrant contained "no averment as to the time when the affiant received information from his anonymous informant or as to the time when affiant [acquired knowledge of illegal activity through firsthand observation]." 356 F.2d at 315, Op. of Judge Spiegel, p. 11a, *post*. Judge Spiegel correctly concluded that "due to the absence of these dates, the anonymous complaints and the affiant's surveillance cannot contribute to a basis for determining the existence of probable cause. To conclude otherwise would be to condone an error so fraught with the potential for abuse as to seriously undermine the constitutional protections afforded by the Fourth Amendment." Op. p. 12a-13a, *post*.

The only remaining factor in the affidavit, other than the anonymous tip and the observation of several cars visiting Petitioner's house, is the examination on the day before the affidavit and warrant were issued and executed, of Petitioner's garbage. Only a small quantity of marijuana was found; sufficiently small, we must observe, that only a minor misdemeanor could have been established even had the temporal deficiencies of the other facts been nonexistent. In fact, under Ohio law, conviction of the minor misdemeanor of possession of less than 100 grams of marijuana "does not constitute a criminal record . . ." R.C. 2925.11(D). Yet the affiant alleged that sale or resale of marijuana — the felony of

drug trafficking — was indicated by the facts within his possession — a conclusion completely unsupported by the facts set forth in the affidavit.

But the small amount of marijuana found also indicates another deficiency in the affidavit and the finding by the Ohio courts that probable cause existed. As the District Court concluded, there was not a large amount of contraband which might have indicated its continued presence in Petitioner's house — the only conclusion which could have been possible was that at some point in time a few marijuana cigarettes had been smoked, as the refuse "is merely the waste product of past marijuana use." Opinion of District Court, p. 13a.

But the discovery of the marijuana in Petitioner's garbage is infected with its own temporal deficiencies. The District Court assumed weekly garbage collection, and concluded correctly that the marijuana might have been used as long as five days before. That is a generous assumption benefitting the prosecution: the garbage might have been sitting in the house for weeks or months prior to its having been discarded. But the District Court correctly concluded that "it is unclear when that past use occurred when the garbage was removed from the house or even when it was scheduled to be picked up." The District Court thereupon concluded that, without corroboration, the discovery on a single instance, of marijuana in Petitioner's garbage could not support a finding of probable cause or probable presence of the contraband on the day of the search.

"To conclude that such a single instance provides sufficient probable cause for a search warrant would be to subject to a full and probing search, the home of a cocktail party host, whose guests, perhaps unbeknownst

to him, indulge in illicit substances and discard the residue. We are not prepared to say that such searches are reasonable within the meaning of the Fourtn Amendment." *Id.*, at 15a.

The Court below, however, concluded as to the temporal deficiencies of the affidavit, that since the anonymous tips and the surveillance "may well have occurred at a time on or about August 11, 1983, only a day before the warrant was requested and issued," the affidavit was sufficient. The Court below thus concluded that the Fourth Amendment permits a search and seizure based on a warrant which provides facts which permit the conclusion that *probable cause **might** exist!* We submit that such a conclusion is not only erroneous, it is feckless.

The search and seizure in this case violated the Fourth and Fourteenth Amendment proscriptions on warrants issued without probable cause, the search and seizure were illegal, and the evidence obtained as the result must be suppressed from evidence. It follows that Petitioner was illegally convicted, and that his conviction was illegally affirmed.

* * *

Since the decision of the District Court, however, this Court decided *United States* v. *Leon*, ____ U.S. ____, 104 S.Ct. 3405, cited in a footnote to the opinion in the Court below. That court did not, however, address the *Leon* ruling in detail, although it did conclude that the ruling of *Leon* applies to this case.

Leon did hold that the exclusionary rule is not to be applied "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and has acted within its scope." 104 S.Ct. at

3420. But the Court also held that "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issued must be objectively reasonable, * * *" and that "Suppression remains an appropriate remedy," where the officer cannot objectively manifest good faith "in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " 104 S.Ct. 3421-22. "Finally, * * * a warrant may be so facially deficient * * * that the executing officers cannot reasonably presume it to be valid." *Id.* at 3422.

The Court specifically noted that *Leon* left "untouched the probable-cause standard and the various requirements for a valid warrant." *Id.* Here, it has been demonstrated that the information in the affidavit could not and did not supply sufficient facts upon which to conclude that probable cause existed.

Probable cause has been defined by this Court as follows:

> [W]hether *at that moment* the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Beck v. *Ohio*, 379 U.S. 89, 91 (1964). *Beck* was concerned with the probable cause necessary to effectuate a warrantless arrest. But while probable cause to arrest is concerned with the guilt of the arrestee, probable cause to search is concerned with the connection of items to crime and with their *present* location, *United States* v. *O'Connor*, 658 F.2d 688 (9 Cir. 1981). But probable

cause, whether to arrest or to search, is dependent upon the temporal determination that *at the moment*, the defendant is a criminal, or contraband is in a certain place.

Certainly, an officer who is also the affiant in an application for a search warrant must know when his own affidavit is silent as to time; he therefore cannot be said to be able to objectively rely upon a search warrant issued by a magistrate on such a deficient affidavit. It is well known among the defense bar that there are some judges who would sign a blank check if proferred by an officer in uniform; the mere fact that a magistrate signs a search warrant is immaterial for Fourth Amendment purposes if the affidavit proferred in support thereof is as fatally defective as was the one here. *Leon* cannot be held to bar the operation of the exclusionary rule in this case.

CONCLUSION

It is evident that the affidavit used to procure the search warrant in this case was fatally defective and could not support the constitutional issuance of the warrant; because of the fatal defects in the affidavit, the officer was not entitled to rely in good faith upon the warrant, particularly when it was his own defective affidavit which caused the warrant to issue. This case falls squarely within the purview of the exceptions to the rule of *Leon*.

More significantly, the District Court hearing the federal prosecution correctly granted Petitioner's motion to suppress. The state courts, all of whom were aware of the decision of a United States District Court deciding precisely the same federal question, ignored that decision and ruled to the contrary, flouting the Supremacy Clause.

The issue of whether the state courts are bound by antecedent decisions of federal courts on precisely the same federal constitutional questions is one which has received little attention in our jurisprudence. It is time that this Court address this issue and the others presented here. Petitioner's case is particularly appropriate for review because federal habeas corpus is foreclosed to him by *Stone* v. *Powell*, *supra*. Should the Court grant certiorari and reverse, state courts will know once and for all that this Court will enforce federal constitutional rights as expounded by federal courts against states whose courts may pay lip service to those federal rulings but flout them nevertheless.

The Court is respectfully urged to grant the Petition for Writ of Certiorari, to reverse Petitioner's conviction, and to remand with instructions to grant his motion to suppress evidence.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-840177
TRIAL NO. B-833392

STATE OF OHIO,
Plaintiff-Appellee,
vs.
RICKIE G. ELLIOTT,
Defendant-Appellant.

DECISION
[Filed December 26, 1984]

Criminal Appeal from: Court of Common Pleas
Judgment appealed from is: Affirmed
Date of Judgment Entry on Appeal: December 26, 1984

Messrs. Arthur M. Ney, Jr., and Paul R. Markgraf, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Merlyn D. Shiverdecker, 1212 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignment of error, and the briefs and arguments of counsel.

The defendant-appellant, Rickie G. Elliott, seeks to overturn a conviction for trafficking in drugs that became a matter of record in the Court of Common Pleas after a judge accepted his plea of no contest to the first of two charges set forth in an indictment returned by the grand jury on October 6, 1983. The question he has posed to us for resolution in this appeal is whether prejudicial error attended the denial of a motion to suppress from evidence quantities of marijuana and other contraband seized on August 12, 1983, when law enforcement officers executed a warrant to search Elliott's home.[1]

The warrant was issued approximately two hours before the search itself took place by a judge of the Hamilton County Municipal Court, who had arrived at a finding of probable cause on the strength of information obtained by one of the investigating officers from several sources. According to the affidavit submitted in support of the request for the warrant, Agent Patrick Dilbert of the Regional Enforcement Narcotics Unit had received an anonymous complaint concerning "drug activity" at a place specifically identified as the residence of Rick Elliott. In response to the complaint, Dilbert had

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[1] The evidence taken from the home included two bags of marijuana seeds, thirty-four bags of marijuana, eighteen pipes, three scales, three packs of rolling papers and a .22 caliber pistol equipped with a clip of ammunition and a silencer.

gone to the designated location less than twenty-four hours before requesting the warrant, picked up two sealed garbage bags that had been "abandoned at the curbside" in front of the home, and proceeded to sift through the contents of the bags in an effort to uncover some evidence to substantiate the illicit activity anonymously attributed to Elliott.

In addition to personal papers bearing Elliott's name and home address, Dilbert found among the garbage in the bags what his training and experience as a narcotics investigator led him to believe were remnants of partially-smoked marijuana cigarettes and stems from marijuana plants. Portions of the suspected contraband were, in fact, analyzed in a field test, the results of which confirmed the presence of marijuana.

Although the anonymous complaint and the ensuing discovery of the marijuana were, without question, the major components of the fundament offered to establish probable cause, the affidavit did include a third strand of evidence that tended, at least from an investigative standpoint, to link the Elliott residence to some form of ongoing criminal enterprise involving narcotics. Agent Dilbert stated specifically that while he was in the vicinity of the home (presumably to pick up and search through the garbage bags in response to the anonymous complaint), he had observed several individuals get out of vehicles and enter the premises, only to stay in each instance for a short period of time. In the officer's view, this was "the normal pattern for drug-related activity."

Elliott now contends in the only assignment of error given to us for review that the evidence ultimately discovered when the investigating officers entered and searched his home pursuant to the warrant should have been suppressed because the information presented to the issuing judge fell short of that necessary to establish

probable cause for the search. As he sees it, there were several deficiencies in the affidavit, and counted among them were the absence of any detail in the anonymous complaint, observations of conduct that could only be described as innocent, the failure to relate the observations and the complaint to a particular period of time, and the absence of any sound basis to conclude that discarded marijuana remnants in the garbage meant that there was ongoing marijuana use in the home.

In a case such as this where the constitutional validity of a search warrant depends upon the sufficiency of statements appearing in the supporting affidavit, it has often been said that the affidavit should be interpreted not in a hypertechnical, but in a common-sense manner, with great deference being paid by a reviewing court to the magistrate's determination of probable cause. *Illinois* v. *Gates* (1983, ____ U.S. ____, 103 S. Ct. 2317; *Spinelli* v. *United States* (1969), 380 U.S. 102, 85 S. Ct. 741; *Brineger* v. *United States* (1949), 338 U.S. 160, 69 S. Ct. 1302. Under this approach, the question is whether, from all the facts and circumstances set forth in the affidavit, there is a "fair probability" that contraband or evidence of a crime will be found if a particular place is searched. In this regard, the magistrate's determination should not be disturbed on appeal if the record discloses a substantial basis for concluding that probable cause did, in fact, exist. *Illinois* v. *Gates*, ____ at ____, 103 S. Ct. at 2332.

Here, there is no question that the anonymous complaint would, standing alone, have been inadequate to sustain a finding of probable cause. Its rather vague allegation of criminal activity, which carried with it absolutely no indicia of credibility or reliability, could, from any reasonable standpoint, have raised only the faintest of suspicions concerning the Elliott residence. As

we have already noted, however, the complaint was but one of three elements in the blend of information provided in support of the application for the warrant. In our estimation, the other two added weight in favor of a finding of probable cause not only because each tended to corroborate the complaint, but also because the discovery of the marijuana provided in its own right a telling basis for the belief that evidence of a drug offense would be found within the home.

Giving the affidavit a common-sense reading in accordance with the prevailing rules of construction, we think it fair to say that the complaint about the drug activity, the discovery of the marijuana in the garbage and the observation of the visitors to the home were not isolated events, one temporally distant from the others. It appears that each may well have occurred at a time on or about August 11, 1983, only a day before the warrant was requested and issued. We are further convinced that the otherwise innocent appearance of the line of visitors entering and leaving the premises acquired a different, more incriminating light when viewed in the context of the investigating officer's training and experience and the other information contained in the affidavit.

We have, in sum, a case in favor of probable cause for a search that is certainly no less substantial than that which confronted us in *State* v. *Coffin* (Sept. 8, 1982), Hamilton App. Nos. C-810799, C-810871, unreported. In *Coffin*, police officers obtained a warrant to search a home after receiving an anonymous tip concerning drug trafficking at that location and removing remnants of marijuana from garbage bags that had been discarded by the defendants. We held, in response to a claim challenging the adequacy of the supporting affidavit, that the discovery of partially-smoked marijuana cigarettes among trash that also contained papers bear-

ing the defendants' names and addresses "was sufficient to persuade a reasonable person that there was probable cause to believe that marijuana was being kept in [the] residence." *Id.* at 5.

In view of the particular facts in *Coffin*, we would, in effect, have to overrule its holding to embrace the argument now advanced by Elliott in this case. There being no persuasive reason to adopt such a course, it is our conclusion here that the affidavit did provide a substantial basis for crediting the finding of probable cause. It follows, then, that the motion to suppress the evidence seized from Elliott's home pursuant to the execution of the search warrant was properly denied,[2] and the assignment of error is, accordingly, without merit.

We affirm the judgment of the Court of Common Pleas.

SHANNON, P.J., PALMER and KLUSMEIER, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

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[2] Although the point has not been addressed by the parties, it appears from the record that this case involved the good-faith execution of a search warrant, a circumstance that is now recognized as an exception to the exclusionary rule under *United States* v. *Leon* (1984), ____ U.S. ____, 104 S. Ct. 3405.

APPENDIX B

THE SUPREME COURT OF OHIO
COLUMBUS

1985 TERM

Case No. 85-275

STATE OF OHIO,

Appellee,

v.

RICKY G. ELLIOTT,

Appellant.

ENTRY

To wit: September 11, 1985

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial consitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Merlyn D. Shiverdecker.

/s/ FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of

Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY, Clerk
/s/ SAM Q. ADKINS, Deputy

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. CR-1-83-100

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RICKY G. ELLIOTT,
Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS
[Filed January 13, 1984]

SPIEGEL, J.:

This matter is before the Court on the defendant, Ricky G. Elliott's motion to suppress evidence (doc. 3), and the United States' memorandum in opposition to that motion (doc. 4). As set forth in the following analysis, we conclude that the affidavit in support of the warrant provides no substantial basis for an inference of probable cause. Therefore, we conclude that the motion to suppress must be granted.

The factual portion of the affidavit in support of the warrant reads in its entirety as follows:

> Due to anonymous citizens complaints concerning drug activity, on the afternoon of August 11, 1983 at approximately 2:00 p.m. affiant picked up two

> sealed garbage bags which were abandoned at the curb side in front of 1102 Madeline Circle, the residence of Rick Elliott. Affiant thoroughly searched through both sealed bags and found a quantity of partially smoked marijuana cigarettes and several stems from marijuana stalks, portions of which were field tested by affiant and found to test positive for marijuana. Also found were personal papers indicating the garbage was the discarded property of Rick Elliott, 1102 Madeline Circle. Affiant having been a police officer for over 4½ years and a narcotics investigator for over 1½ years has had numerous contacts with marijuana and is familiar with its appearance and the normal packaging and pattern for its distribution. Affiant has observed several vehicles which have visited the described premises and stayed for only a short period of time which is, to affiant, the normal pattern for drug related activity.

The affiant is sworn to and subscribed by Agent Patrick A. Dilbert of the Regional Enforcement Narcotics Unit. The search warrant was issued under the authority of the Hamilton County Municipal Court.

Anonymous tips traditionally have been analyzed under the framework developed in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969). The *Aguilar-Spinelli* analysis involves the two-pronged test concerning (1) the basis of the informant's information and (2) the veracity of the informant. This approach was modified in *Illinois* v. *Gates*, 103 S.Ct. 2317 (1983). No longer is the *Aguilar-Spinelli* two-pronged test the talisman for determing whether an informant's tip rises to the level of probable cause. Rather, the two-prongs are properly viewed as relevant

considerations in a totality of the circumstances approach to whether probable cause exists.

Ordinarily, we would apply this analysis to a case involving anonymous complaints offered in support of a search warrant. However, the instant case presents serious questions as to the timeliness of both the anonymous complaints as well as affiant's surveillance. Because we find nothing in the affidavit indicating when the anonymous complaints were received, we conclude that those complaints cannot possibly form the basis for a determination of probable cause. Therefore, we do not reach the questions posed by *Aguilar*, *Spinelli* and *Gates*.

As a preliminary matter, we note that "a state search warrant being challenged in a federal court must be judged by federal constitutional standards." *Elkins* v. *United States*, 364 U.S. 206 (1960); *United States* v. *McManus*, 719 F.2d 1395 (6th Cir. 1983). We also note that our review is limited to the four corners of the application and affidavit. *Spinelli* v. *United States*, 393 U.S. 410, 413 n.3 (1969).

Turning next to the problem of when the anonymous complaints were received, we are guided by considerations set forth in the thoughtful opinion of Judge Coffin in *Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966) and applied by the Sixth Circuit in *United States* v. *Boyd*, 422 F.2d 791 (1970). In *Rosencranz*, the Court reviewed the issuance of a search warrant based upon the affidavit that contained no "averment as to the time when the affiant received information from his anonymous informant or as to the time when affiant [acquired knowledge of illegal activity through firsthand observation]." 356 F.2d at 315. The only indication of time in *Rosencranz* was that the affidavit was phrased in

the present tense. In holding the warrant invalid, the Court cautioned:

> The present tense is supported in the air; it has no point of reference. It speaks, after all, of the time when an anonymous informant conveyed information to the officer, which could have been a day, a week, or months before the date of the affidavit. To make a double inference, that the undated information speaks as of a date close to that of the affidavit and that therefore the undated observation made on the strength of such information must speak of an even more recent date would be to open the door to the unsupervised issuance of search warrants on the basis of aging information. Officers with information of questionable recency could escape embarassment by simply omitting averments as to time, so long as they reported that whatever information they received was stated to be current at that time. Magistrates would have less opportunity to perform their 'natural and detached' function. Indeed, if the affidavit in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for them.

Id. at 316-17, *quoted with approval in United States* v. *Button*, 653 F.2d 319, 325 (8th Cir. 1981).

The affidavit in this case suffers from the same temporal deficiencies. The affiant has neglected to include averments as to the date(s) of the anonymous complaints and the date(s) of his surveillance. We do not intend to intimate that the affiant attempted deception by the omission of these dates. Nevertheless, we can only conclude that, due to the absence of these dates, the anonymous complaints and the affiant's surveillance cannot contribute to a basis for determining the ex-

istence of probable cause. To conclude otherwise would be to condone an error so fraught with the potential for abuse as to seriously undermine the constitutional protections afforded by the Fourth Amendment.

What remains in support of the warrant is the averment as to the fruits of the search of the defendant's garbage, that is, an unspecified "quantity of partially smoked marijuana cigarettes and several stems from marijuana stalks." Parenthetically we note that a piecemeal analysis of the affiant is generally inappropriate in determining the validity of a search warrant. Instead, the determination of probable cause should be "based upon a commonsense reading of the entire affidavit." *Spinelli*, 393 U.S. at 415. However, in this case we must restrict our focus to the contraband found in the garbage, as the temporal deficiencies discussed above leave nothing else for consideration.

We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

Furthermore, the nature of the evidence is not such that its continued presence in the home is probable. To the contrary, this refuse is merely the waste product of past marijuana use. Moreover, it is unclear when that past use occurred, when the garbage was removed from the house or even when it was scheduled to be picked up. Even assuming weekly garbage collection, the con-

traband may well have been evidence of marijuana use five days prior to the examination of the garbage. Without corroboration, we cannot say that this supports a conclusion of the probable presence of contraband on the day of the search.

We can conceive of the argument that the anonymous complaint and the affiant's surveillance, despite their deficiencies, are corroborative of the contraband found in the garbage, and therefore permit the conclusion of the continued presence of contraband. Given the nature of the contraband found in this case, we find this argument unpersuasive. The waste products of marijuana use do not, of themselves, indicate any continuing presence of contraband in the home. As for the complaints and the surveillance, it is difficult to perceive how information which was pertinent perhaps weeks or months before can permit the inference of a current continued presence of contraband, even assuming that such information may have indicated a continued presence at that earlier time. Such conjecture is more appropriate in the discussion of possibilities than it is in the discussion of probabilities.

We are aware of cases in which evidence of drug use discovered in the defendant's garbage contributed to or provided the sole basis for the determination of probable cause. *See United States* v. *Sumpter*, 669 F.2d 1215 (8th Cir. 1982); *United States* v. *Reicherter*, 647 F.2d 397 (3d Cir. 1981). However, in *Sumpter* the presence of marijuana in the garbage was accompanied by an anonymous tip received three days prior, and the hearsay statements of the garbage carrier that on the day of the garbage search, several cars had made short stops at the defendant's home during the time it took to collect the refuse in the alley.

Reicherter is somewhat more instructive for the pur-

poses of this case. There, probable cause rested entirely on the evidence found in the defendant's garbage. However, the evidence was collected on three separate occasions, thus indicating a continuing presence of contraband in the defendant's home. Significantly, the instant case involves a single search of the defendant's garbage, an examination that yielded perhaps a small amount of discarded marijuana cigarettes and stems. We do not think that such evidence of a single instance of past use, even in the immediate past, renders the continued presence of contraband reasonably probable.[1]

In closing, we reiterate our conclusion that the substantive points of law decided in *Illinois* v. *Gates*, 103 S.Ct. 2311 (1983) are no more than tangentially relevant to this case. However, we do heed the Court's guidelines concerning judicial review of the issuance of a search warrant. Nevertheless, the suggested deference to the issuing Magistrate's decision cannot be tantamount to an abdication of the reviewing Court's responsibility. It is with this thought in mind that we reach our decision.

In accordance with the foregoing, the defendant's motion for the suppression of the evidence is hereby granted.

So ORDERED.

/s/ S. ARTHUR SPIEGEL
United States District Judge

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[1] To conclude that such a single instance provides sufficient probable cause for a search warrant would be to subject to a full and probing search, the home of a cocktail party host, whose guests, perhaps unbeknownst to him, indulge in illicit substances and discard the residue. We are not prepared to say that such searches are reasonable within the meaning of the Fourth Amendment.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. CR-1-83-100

UNITED STATES OF AMERICA
vs.
RICKY G. ELLIOTT

ORDER DENYING UNITED STATES' MOTION FOR RECONSIDERATION
[Filed February 29, 1984]

This matter is before the Court on the United States' motion to reconsider our order granting the defendant's suppression motion (doc. 7), and the defendant's memorandum in opposition (doc. 8). The United States brings this motion in light of two cases recently argued before the United States Supreme Court concerning the behavior of magistrates and law enforcement personnel in issuing and executing a search warrant. *Massachusetts* v. *Sheppard*, 82-963, 34 Cr L 4026 and *United States* v. *Leon*, 82-1771, 34 Cr L 4029. These cases once again present the Court with the issue of whether there is a "good faith exception" to the exclusionary rule.

Defendant opposes this motion and contends that "good faith" has no relevance to the case at bar. Furthermore, defendant argues that a reading of the reports of oral arguments in the above cited cases does not lead

to a conclusion that those cases will be decided on a "good faith" rationale.

Assuming for the purposes of this motion that the Supreme Court will address the issue of "good faith" in the pending cases, we nevertheless deny the government's motion. Our reasoning in this case focused entirely on the failure of the affiant to set forth in requisite detail sufficient facts to support a finding of probable cause. Our most significant concern was the utter failure of the affiant to provide the issuing magistrate with any time frame as to when critical observations were made. We are therefore of the opinion that any interpretation of "good faith" that would excuse these fatal omissions would truly be an exception that would swallow the exclusionary rule. We do not anticipate such a drastic departure from established principles.

In accordance with the foregoing, the United States' motion for reconsideration is hereby denied.

So Ordered.

/s/ S. ARTHUR SPIEGEL
United States District Judge.